No. 15715

United States Court of Appeals

For the Ninth Circuit

VAUGHN CECIL COWELL, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLANT

RICHARD D. HARRIS
Attorney for Appellant.

Office and Post Office Address:
428 Henry Building,
Seattle 1, Washington.

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JURISDICTION

The United States Attorney for the Western District of Washington filed an information consisting of one count, charging the appellant, Vaughn Cecil Cowell, with a violation of Title 18, U.S.C., Section 659, rendering it unlawful to steal from a wharf, vodka of a value not in excess of $100.00, and convert it to his own use, said vodka being a part of a shipment in interstate commerce (R. 3). The appellant entered a plea of not guilty and the case was tried before a jury, which rendered a verdict of guilty (R. 4).

The court subsequently sentenced the appellant to six months' imprisonment (R. 5).

After entry of judgment and commitment, the appellent gave timely notice of appeal (R. 6), in accordance with Rule 37 of the Federal Rules of Criminal Proce-

dure (Title 18, U.S.C.) and perfected the same in accordance with Rule 39 of the Federal Rules of Criminal Procedure and the Rules of the Court of Appeals, Ninth Circuit.

STATEMENT OF THE CASE

The appellant, Vaughn Cecil Cowell, a resident of Seattle, Washington, for several years, and a man fifty-three years of age who worked as a longshoreman on the Seattle waterfront for approximately twenty-five years, was arrested on March 4, 1957, for the misdemeanor set forth in the information alleged to have occurred on February 13, 1957, at Seattle, Washington. He had a preliminary hearing before the United States Commissioner on March 11, 1957, and subsequently his case came on for trial before the United States District Court for the Western District of Washington, Northern Division, on July 9, 1957, and a verdict of guilty was returned on the same day.

The testimony showed on the night of February 13 and the early morning of February 14, 1957, the appellant, David Linden and Daniel Abel, were unloading a vessel that was docked at Pier 50 in Seattle, Washington. That part of the cargo discharged from the vessel was located in the warehouse on Pier 50 and consisted in part of several cases of vodka. During the course of the evening, it was testified by David Linden that he observed the appellant go over by the cases of vodka and take a bottle of vodka from one of the cases, come directly back to where David Linden was standing, which was from ten to twenty feet, hand the bottle of vodka to Linden and then the appellant left. Another witness

observed David Linden take this bottle, place it under a bull-rail and subsequently during the course of the evening, this witness, with the assistance of another witness, replaced the bottle of vodka placed under the bull-rail by David Linden, with another bottle of vodka which they continued to observe, and later on in the same evening, David Linden returned to the bull-rail, took the substituted bottle of vodka, drank its contents and threw the bottle over the side.

The Federal Bureau of Investigation questioned the appellant on February 20, 1957, at which time he denied any connection with the theft of the vodka. Subsequently, the appellant was arrested, tried and convicted as previously set forth.

During the course of the trial proceedings, the appellant requested an instruction on "accomplice" (R. 9), and cited to the court, *Holmgren v. U. S.,* 217 U.S. 509, p. 523 (R. 9). Thereafter the court instructed the jury (R. 10).

SPECIFICATIONS OF ERROR

1. That the court erred in its instructions to the jury regarding the testimony of an accomplice.

2. That the court erred * * * in commenting on the evidence during its instructions to the jury.

ARGUMENT

Point 1. That the Court Erred in Its Instructions to the Jury as Regarding the Testimony of an Accomplice.

Throughout the trial, the only testimony conclusively connecting the defendant with the violation charged was the testimony of David Linden. This was apparent

to the trial court throughout the entire proceedings. At the conclusion of all the testimony and prior to instructing the jury, the trial court's attention was called to a request for an instruction on "accomplice." Likewise, the case of *Holmgren v. U. S.,* 217 U.S. 509, at p. 523, was called to the court's attention (R. 9). In view of the fact that this case was cited to the trial court and it was requested that it would undoubtedly be better practice for the court to caution juries in reliance on testimony of accomplices, and to require corroborating testimony before giving credence to them (R. 10), and while this fact had been pointed up to the court, and received approval at least in previous cases handed down from the Ninth Circuit, it was felt that the trial court should have instructed more particularly and fully on the question of accomplice. Further, during the course of the instructions, the court indicated,

> "I want to point this out as a matter of comment, that the defendant is the only one here on trial * * *. There was evidence concerning Mr. Linden's activities and I will tell you about that also later as to the weight you could give his statement, but now I merely state that whether Mr. Linden is likewise guilty of a crime, or Mr. Abel was guilty of some offense, is not involved in this case only to the extent of the credibility of those witnesses. I want to direct your attention once again to the fact that if you find beyond a reasonable doubt and to a moral certainty, that the defendant is guilty of this crime, you should bring in a verdict of conviction regardless of whether other people might also be guilty of a crime * * *." (R. 12-13)

In the above instruction, the court had pointed out

that "there was evidence concerning Mr. Linden's activities, and I will tell you about that also later as to the *weight* you can give his statement," the court was obviously and pointedly indicating to the jury to expect something particular as far as Mr. Linden's testimony was concerned. The court commented further:

> "As you can see from the testimony, this case bristles with issues of veracity. In instances too numerous to mention, the testimony of witnesses called by the Government, is flatly contradicted by the testimony of the defendant himself." (R. 16-17)

The court instructed on the question of accomplice in the following particular (R. 20):

> "All evidence of a witness who is connected with the commission of the offense charged should be considered with caution and weighed with great care. One who is connected with the commission of the offense charged is referred to as an accomplice. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain the verdict of guilty even though not corroborated or supported by other evidence, but I instruct you that before you may find a verdict of guilty on the unsupported evidence of an accomplice, you must believe that evidence beyond a reasonable doubt and to a moral certainty. In other words, his testimony alone must establish the guilt beyond a reasonable doubt and to a moral certainty."

This instruction alone without more on the case would probably have covered the matter in question. However,

with the circumstances of this particular case, together with the position of this instruction in the over-all instructions of the court, together with the court's comments on the evidence and reference to various matters, it appears that the appellant did not receive a fair trial in view of the above instruction submitted to the jury. Exception was taken by the appellant to the instruction and also the manner in which it was given (R. 24).

Further, on the question of the accomplice instruction, the court's attention is called to *Kearns v. U. S.*, 27 F.2d 954 (C.C.A. 9th) at page 856:

> "While the testimony of an accomplice is to be treated like that of other witnesses and considered for all purposes and may be believed, such testimony is not regarded with favor, but should be received with caution and should be closely scrutinized and viewed with distrust, and even under the common law rule that it is not essential that testimony of accomplices be corroborated, the jury should be instructed as to the danger of convicting upon the evidence of accomplices alone." 16 C.J. 694.
>
> "In *Holmgren v. U. S.*, 217 U.S. 509 (523) * * * the court said, "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error."

In the same case, the court continued on to say:

> "A proper instruction on the testimony of accomplices should have been given, but the request

here made was not a proper one. By the request, the guilt or innocence of the parties charged was made to depend solely on the credence given to the testimony of the accomplice, regardless of corroborating testimony, and regardless of any other consideration."

It is therefore submitted that the *Kearns v. U. S., supra,* case is authority for the proposition that when the proper request is made by the defendant for an accomplice instruction, that the request should be honored by the trial court. If this is not the law in this Circuit, then the *Holmgren v. U. S., supra,* case should be distinguished and set aside. In the instant case, the *Holmgren* case was called to the attention of the trial court, exceptions were taken, and the record, I believe, is clear on that issue (R. 9).

Point 2. That the Court Erred in Commenting on the Evidence During Its Instructions to the Jury.

The trial court during the course of the proceedings took more than a healthy interest in the trial of the case. The instructions reflect that interest by various "comments" intermingled throughout the court's instructions to the jury (R. 12, 13, 14, 16). The case took one day to try, including the selection of the jury, all the opening statements and arguments, the review of the instructions, the trial of the case, submitting the case to the jury, and the return of the verdict. It was manifestly short in duration and the jury had the benefit of all the testimony and proceedings, which in effect should have reduced the number of comments required by the trial court.

The appellant objected, particularly to the court's comment regarding the doing or failure to do a good job by the F.B.I. or other investigative agencies, commingling this with comments concerning Mr. Linden and Mr. Abel (R. 12-13). This was called to the court's attention by the appellant (R. 24). Subsequently, the court did call the jury back and instructed the jury concerning the question that they are the sole and exclusive judges of the facts and credibility of all the witnesses (R. 25), and stated further that the federal judge has the power to sum up the evidence and to suggest conclusions thereon, either as to the guilt or innocence of the defendant or credibility of witnesses, or any other feature in the case (R. 25). Then the court went on to say:

> "I did not exercise that option except *in one instance for the purpose of telling you what I regarded to be extraneous evidence;* that is, you will recall that I said the F.B.I. is not on trial and neither is the United States Attorney, and the only fact in question was whether the defendant is or is not guilty. I made that as a part of a comment." R. 26)

Had the trial court stopped at that point there would have been no complaint on the part of the appellant. However, the court continued on immediately after that to say:

> *"You are not bound by that statement although I think it is a true statement."* (R. 26)

This additional comment made and emphasized by the court in the light of what had transpired previously was again excepted to by the appellant and the particular language called to the trial court's attention (R. 27).

The trial court's response as to why it made that remark was to the effect that had he not made that remark, he would have "looked a little ridiculous" (R. 28). It is contended by the appellant that the primary concern of the trial court should be that the defendant is afforded a fair trial. Nothing more, nothing less. In *McAllister v. U. S.*, 239 F.2d 76 (D.C., 1956), the Circuit Court stated that the trial court's instruction and comment "To reach a verdict * * * should not invoke any difficulty." The court in that case stated, "that appellant on appeal had contended that this interfered with the jury's deliberation and encouraged it to return a guilty verdict. Clearly, this gratuitous remark was not well advised. But defendant counsel did not object below as required * * * and in the circumstances of this case, we cannot say that refusal to consider the matter on appeal will result in manifest injustice." That is not the situation in the instant case. Here the matter was called to the trial court's attention on not one, but two, occasions, and no once, but twice, was the adverse comment made by the trial court, which resulted in the defendant not receiving a fair trial.

CONCLUSION

It is urged that the two points raised here on appeal are meritorious in view of the language of the various appellate courts, and either one or both of the alleged errors are grounds sufficient to grant to the appellant a new trial.

Respectfully submitted,

Richard D. Harris
Attorney for Appellant.